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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. **1030**

HUGH H. WILSON CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statutes Involved 2

Statement of the Case 3

Decision of the Trial Examiner 4

Decision of the National Labor Relations Board 4

Decision of the Court of Appeals 5

Reason for Granting Review 5

POINT I—

Certiorari Should Be Granted in Order to Resolve a Conflict Within the Circuits as to Whether Employee Griping Is Protected Concerted Activity.... 5

A. The Third Circuit Holds that Griping Is Concerted Activity 5

B. The Second And Seventh Circuits Hold That Griping Is Not Concerted Activity 7

POINT II—

The United States Circuit Courts of Appeal Have Consistently Found that Employee Activity Is Concerted Only if It Contemplates Present or Future Group Action 8

PAGE

A. Where the Conduct Involved Does Not Relate to Group Action, the Circuit Courts of Appeal Have Concluded There Was No Concerted Activity Within the Protection of the Act 9

B. Where the Conduct Involved Relates To Group Action, the Circuit Courts of Appeal Have Concluded There Was Concerted Activity Within the Protection of the Act 10

POINT III—

The Question Posed by the Instant Case Involves a Fundamental Interpretation and Application of Section 7 of the NLRA and Is of Far Reaching Importance to Industry and Labor 11

CONCLUSION 13

APPENDIX A—

Opinion of the Court of Appeals for the Third Circuit 1a

APPENDIX B—

Judgment of the United States Court of Appeals For the Sixth Circuit 26a

APPENDIX C—

Decisions and Orders of the National Labor Relations Board and Trial Examiner 27a

Table of Cases

PAGE

American Art Clay Co. v. NLRB, 328 F.2d 88 (7th Cir. 1964) 8n

B & P Motor Express, Inc. v. NLRB, 413 F.2d 1021 (7th Cir. 1969) 10

Garner v. Teamsters Local 776, 346 U.S. 485 12

Hugh H. Wilson v. NLRB, 414 F.2d 1345 (3rd Cir. 1969) 1

Indiana Gear Works v. NLRB, 371 F.2d 273 (7th Cir. 1967) 7, 8, 9

Modern Motors, Inc. v. NLRB, 198 F.2d 925 (8th Cir. 1952) 10

NLRB v. Office Towel Supply Co., 201 F.2d 838 (2nd Cir. 1953) 7, 9

NLRB v. Texas Natural Gasoline Corp., 253 F.2d 322 (5th Cir. 1958) 9

NLRB v. Westinghouse Electric Corp., 179 F.2d 507 (6th Cir. 1949) 9

Owens-Corning Fiberglass Corp. v. NLRB, 407 F.2d 1357 (4th Cir. 1969) 10

Signal Oil Co. v. NLRB, 390 F.2d 338 (9th Cir. 1968) 10

Statutes and Authorities Cited

National Labor Relations Act, as amended (61 Stat. 136; 73 Stat. 519; 29 U.S.C. et seq.) 2

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HUGH H. WILSON CORPORATION,

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NATIONAL LABOR RELATIONS BOARD,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Hugh H. Wilson Corporation, Petitioner herein, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on August 4, 1969, granting enforcement of an order issued against Petitioner by the National Labor Relations Board.

Opinions Below

The opinion of the Court of Appeals is reported at 414 F. 2d 1345, 71 LRRM 2827 (3rd Cir. 1969) (App. A, pp. 1a-25a). The decision and order of the National Labor Relations Board are reported at 171 NLRB No. 145 (App. C, pp. 27a-56a).

Jurisdiction

The judgment of the Court of Appeals was entered on August 4, 1969 (App. B, p. 26a). The Company's petition for a rehearing was denied on October 7, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Question Presented

Does individual griping—and nothing more—constitute concerted activity within the meaning and protection of the National Labor Relations Act?

Statutes Involved

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. *et seq.*) are as follows:

Rights of Employees.

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices.

> Sec. 8(a). It shall be an unfair labor practice for an employer.

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7;

Statement of the Case

Hugh H. Wilson Corporation is a Pennsylvania corporation, having its principal place of business in Sunbury, Pennsylvania. It is engaged in interstate commerce. No labor organization is involved in this matter.

Each year the Company's supervisors distribute to employees profit-sharing statements which state the amount set aside for each employee. The Company was financially unable to make contributions to the plan for the year 1966 since it had entered new consumer markets and had purchased new machinery, equipment and molds (R.A. 115-116).[1]

During the early part of the week of June 12, 1967, Larry Bidelspach, the Employer's plant manager, instructed all of his supervisors to explain to each of their employees the reasons for the Company's inability to make contributions to the plan for the previous year. Pursuant to these instructions, Bruce Minnier distributed the profit-sharing statements to the employees in the machine shop during the morning of June 16, 1967. As he did so, he told each employee that there would be a meeting that afternoon to discuss the statement (R.A. 163). When employee William Moll was handed his profit-sharing statement, he expressed dissatisfaction (R.A. 164). Coincidentally, employee Edwin Gibson, after leaving his work station, asked James Howard, a supervisor, why a profit-sharing contribution had not been made (R.A. 147-148).

[1] The Xerox copies (Vols. I and II) of the record appendix and transcript of testimony which was filed in the Court below will be referred to as R.A.

No other employees were involved in Moll's griping, or Gibson's questioning of Howard.

At the meeting called by the Company, Minnier explained to the employees why the Company was financially unable to contribute to the profit-sharing plan. After finishing his presentation, Minnier invited questions and comments from the employees. Moll criticized the Company for using his money to invest in new machines. (R.A. 165-166).

Following the meeting, Moll returned to his work station and started shouting that the Company was "no damned good, no God-damned good" and further vilified the Employer with other expletives. As he shouted, he kept pounding the lathe with something in his hand (R.A. 166). Minnier attempted to calm him down by explaining that the Company, by investing in additional equipment, had made his job more secure. Moll replied crassly, "That's a lot of bull shit." (R.A. 168).

The Company subsequently reviewed the personnel files of Moll and Gibson. As a result, they were terminated on Tuesday, June 20, 1967.

Decision of the Trial Examiner

The Trial Examiner for the National Labor Relations Board issued his decision on February 2, 1968. He found that the discharge of Moll and Gibson violated Section 8(a)(1) of the Act and recommended remedial action, including reinstatement.

Decision of the National Labor Relations Board

On June 5, 1968, the Board issued its decision and order affirming and adopting the findings, conclusions and recommendations of the Trial Examiner. 171 NLRB No. 45.

Decision of the Court of Appeals

On July 3, 1969, a three judge panel for the Third Circuit rendered its decision enforcing the Board's Order. One judge dissented. The Company thereafter petitioned the Court for a rehearing which was denied on October 7, 1969.

Reason for Granting Review

The Court should resolve a conflict between the Circuit Courts of Appeal as to the meaning of "concerted activities", which requires a fundamental interpretation of Section 7 of the National Labor Relations Act.

POINT I

Certiorari should be granted in order to resolve a conflict within the circuits as to whether employee griping is protected concerted activity.

A. The Third Circuit Holds That Griping Is Concerted Activity.

This case is brought to this Court because the Company was found to have illegally discharged two employees who, separately and independently, criticized the Company's failure to make contributions to a profit-sharing plan. The sole question posed is whether this griping is concerted activity. The Court of Appeals for the Third Circuit, in agreement with the Board, held that it was.

The discharged employees, Moll and Gibson, engaged in no physical action; they did not encourage or participate in a walkout; they did not prepare or circulate a petition. Their only activity was *talk*, in which they independently expressed their dissatisfaction with the Company's inability to make a contribution to its profit-sharing plan.

Moll's criticism was considerable.[2] It ranged from the vindictive to the profane. He told Gibson that he "thought it was a kind of dirty deal." (R.A. 74-75). After the meeting which the Company had called to discuss its inability to contribute to profit-sharing, Moll castigated the Company: "This Company is no damn good, no God-damned good." (R.A. 166).

Judge Kalodner, the dissenting member of the three judge panel which found that the Company violated the Act, accurately characterized the statements of Moll and Gibson:

> "The evidence in the instant case establishes that everything said by the discharged employees was no more than an expression of their dissatisfaction with respect to the employer's announcement that it would, for pressing financial reasons, be unable to make contributions to its profit-sharing plan for the year 1966. *These expressions were nothing more than 'griping' and could not by any stretch of the imagination be said to attain the dimension of an intention or attempt to initiate or promote concerted action by their fellow employees.*" 414 F. 2d at 1357. (Emphasis added.)

The majority, however, found that Moll and Gibson's griping was concerted activity. The Court held that when:

> ". . . 'griping' coalesces with expression inclined to produce group or representative action, the statute protects the activity. . . ." 414 F. 2d at 1348.

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[2] Gibson died prior to the hearing before the Board's Trial Examiner. In any event, his testimony was not essential. In concluding that Moll and Gibson were engaged in concerted activities, neither the Board nor the Court premised their finding on the fact that two employees were involved.

Thus, under the Court's rule, individual griping is concerted activity.

B. The Second And Seventh Circuits Hold That Griping Is Not Concerted Activity.

The Second Circuit has stated that griping is not concerted activity. The factual context for this conclusion is similar to that of the instant matter. An employee expressed dissatisfaction with the company. She stated that it was "a hell of a place to work, they expect one girl to do the work of five and a girl doesn't get time to go to the ladies room." The court rejected any notion that griping is protected concerted activity:

> "We think mere griping far too 'inchoate', that an employee's complaint, if addressed to other employees, is not, without more, 'the sort of activity which Congress intended this Board to protect.'" *NLRB* v. *Office Towel Supply Co.*, 201 F. 2d 838, 841 (2nd Cir. 1953).

The court explained the rationale for this conclusion:

> "Such a doctrine would prevent an employer from discharging any employee who, in the presence of fellow employees, expressed a severe condemnation of the employer's ways, because any such grousing, in and of itself, would be 'calculated to induce group action by the employees to correct a grievance' and therefore amounts to 'concerted activity at its inchoate state.'" *NLRB* v. *Office Towel Supply Co., supra,* at 841.

The Seventh Circuit has also refused to elevate griping to the level of concerted activity. In *Indiana Gear Works* v. *NLRB,* 371 F. 2d 273 (7th Cir. 1967), an employee drew cartoons ridiculing the recent wage increase granted by

the company. He posted the cartoons conspicuously over his machine so other employees could view the results of his displeasure. The court concluded:

> "It has been held that a complaint or gripe by an employee is not concerted activity (citation omitted) even though addressed to other employees. . . ." *Indiana Gear Works* v. *NLRB,* 371 F. 2d at 276.

Had the instant case arisen in the Second or Seventh Circuits, the Board's order would not have been enforced.[3] This Court should resolve the conflicts between the Circuits and determine whether Congress intended that individual griping is concerted activity within the meaning and protection of the Act.

POINT II

The United States Circuit Courts of Appeal have consistently found that employee activity is concerted only if it contemplates present or future group action.

Individual employee activity falls under the mantle of concerted activity only if its objective is group action. This objective may be contemplated for immediate fulfillment or for future fulfillment. In either case, the *individual's conduct must be related to group action.* The United States Courts of Appeal for six of the circuits have uniformly so held. *For the first time, in this case, a court has*

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[3] In a case analogous to the instant matter, the Seventh Circuit found that employee gripes were not entitled to the protection of the Act. In *American Art Clay Co.* v. *NLRB,* 328 F. 2d 88 (7th Cir. 1964), at an employer-called meeting, one of the employees (Songer) interrupted the plant superintendent and stated that if the company wanted more production, the men wanted more money. Other employees cried out, "That's right, we're with Joe." 328 F. 2d at 89. The court reversed the Board and concluded that the statements made by Songer and the other employees at the meeting did *not* constitute concerted activity.

stated that mere talk, with no purpose related to group action, constitutes concerted activity. This abrupt departure from an unbroken line of cases as demonstrated by the following charts, mandates Supreme Court review.

A. Where the Conduct Involved Does Not Relate to Group Action the Circuit Courts of Appeal Have Concluded There Was No Concerted Activity Within the Protection of the Act.

Case	Employee Conduct	Court Finds There Was No Group Action Nor Was It Contemplated
1. *NLRB* v. *Westinghouse Electric Corp.*, 179 F. 2d 507 (6th Cir. 1949).	A number of group leaders individually asked the foreman whether wage rates at another plant were higher.	"The activity which came to the foreman's attention was entirely the result of individual concern." 179 F. 2d at 509.
2. *NLRB* v. *Office Towel Supply Co.*, 201 F. 2d 838 (2nd Cir. 1952).	Employee told other employees that the company was "a hell of a place to work."	". . . an employee's complaint if addressed to other employees, is not, without more . . ." protected activity. 201 F. 2d at 841.
3. *NLRB* v. *Texas Natural Gasoline Corp.*, 253 F. 2d 322 (5th Cir. 1958).	One employee failed to report for work and one walked off the job.	"There is no showing of any concert of plan between Hood and Little." 253 F. 2d at 325.
4. *Indiana Gear Works* v. *NLRB*, 371 F. 2d 273 (7th Cir. 1967).	Employee prepared and posted cartoons ridiculing a wage increase.	"There is no evidence in the record that Packard prepared and posted the cartoons for the purpose of inducing or preparing for any group action by the employees." 371 F. 2d at 276.

B. Where the Conduct Involved Relates To Group Action the Circuit Courts of Appeal Have Concluded There Was Concerted Activity Within the Protection of the Act.

	Case	Employee Conduct	Court Finds There Was Group Action or It Was Contemplated
1.	*Modern Motors, Inc.* v. *NLRB,* 198 F. 2d 925 (8th Cir. 1952).	Employees engaged in a work stoppage to protest company's failure to pay a bonus.	The stoppage was " . . . the concerted presenting of a grievance concerning conditions of employment. . . ." 198 F. 2d at 926.
2.	*Signal Oil Co.* v. *NLRB,* 390 F. 2d 338 (9th Cir. 1968).	Employee spoke out in support of strike by other employees.	The Act guarantees the right of employees to engage in joint action which includes "speech supporting such joint action." 390 F. 2d at 343.
3.	*Owens-Corning Fiberglass Corp.* v. *NLRB,* 407 F. 2d 1357 (4th Cir. 1969).	Employees prepared and circulated petition protesting supervisor's actions.	The activity ". . . was plainly intended to enlist the support and assistance of other employees. . . ." 407 F. 2d at 1365.
4.	*B&P Motor Express, Inc.* v. *NLRB,* 413 F. 2d 1021, 50 LC (10,260) (7th Cir. 1969).	Employees walked out to protest working conditions.	"[T]he four employees acted in concert in a common cause. . . ." 413 F. 2d at 1023.

In the instant matter, there was no group action and no group action was contemplated. There was no strike, no slowdown and no petition circulated. All that we have here is individual griping. Nor was there any showing that the griping of Moll and Gibson was intended to induce or prepare employees for any group action. Such conduct has never before been found to be protected concerted activity.

POINT III

The question posed by the instant case involves a fundamental interpretation and application of Section 7 of the NLRA and is of far reaching importance to industry and labor.

The *sine qua non* of concerted activity is a finding of group action, or conduct which contemplates group action.

The individual statements of Moll and Gibson, statements which do not evidence that any group action was to be taken or was even contemplated, are herein said to constitute group action.

According to the Third Circuit, talk and griping which is ". . . inclined to produce group or representative action . . .", 414 F. 2d at 1348, or is a possible "suggestion" of group action, 414 F. 2d at 1349, is concerted activity. These interpretations of the Act are novel.

Section 7 of the Act provides that:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities* for the purpose of collective bargaining or other mutual aid or protection. . . ."

Section 7 does not state, nor is there evidence that it was the intention of Congress, that an *inclination* towards concerted activity should be protected. Activity "inclined to produce group or representative action" has never been protected by this or any other court.

A possible leaning toward group action, unthought out and unstated, does not constitute concerted activity within the meaning of the Act.

Prior to the Third Circuit's decision in the instant matter, the United States Circuit Courts of Appeal were in harmony. Speech could properly constitute concerted activity only if it was part of group action or contemplated future group action. The Third Circuit has herein parted with its sister courts and now holds that griping which ". . . coalesces with expression inclined to produce group or representative action . . ." is concerted activity. 414 F. 2d at 1348.

The Third Circuit's rule leads to a highly undesirable result. The essential facts of the instant case have universal application. An employee, in the presence of a management representative, comments that he is not satisfied with a term or condition of employment. A second employee, who is also present, concurs. There is no mention of group action to correct the condition. If, for any reason, one of the employees is subsequently discharged, sufficient evidence to support a Section 8(a)(1) violation is present. This is so, according to the Third Circuit, even though there is no indication that the employees' dissatisfaction contemplated group action, present or future.

Viewed in this context, it is apparent that guidance is needed from this Court with respect to the extent speech can properly constitute concerted activity protected by the Act.

The decisions of the other United States Courts of Appeal stand in glaring contrast to that of the Third Circuit. The existence of conflicting standards on this critical issue in labor management relations hampers the uniformity of national labor policy that the Act was designed to realize. Cf. *Garner* v. *Teamsters Local 776,* 346 U.S. 485, 490-91. This conflict has created a twilight zone between "gripes" and "concerted activity" which should be illuminated by this Court.

CONCLUSION

It is respectfully requested that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit and thereby resolve a significant conflict in the circuits regarding the meaning of concerted activity, an interpretation which is fundamental to the application of Section 7 of the National Labor Relations Act.

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Dated: January 2, 1970.

APPENDIX A

Opinion of the Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17418

HUGH H. WILSON CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND ON CROSS-PETITION TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued January 24, 1969

Before McLAUGHLIN, KALODNER and STAHL, *Circuit Judges*

OPINION OF THE COURT

(Filed July 3, 1969)

STAHL, *Circuit Judge*

This appeal arises because of the discharge of two employees of petitioner, the Hugh H. Wilson Corporation, a manufacturer of hair curlers and bobby pins in Sunbury, Pennsylvania, after they had engaged in certain activities in response to the employer's announcement that instead of making contributions to the corporation's profit-sharing

plan for the prior year 1966, the profits would be used for the purchase of new machinery and equipment. The employees, claiming they were discharged for engaging in protected concerted activities in violation of the National Labor Relations Act, filed unfair Labor (sic) practice charges with the National Labor Relations Board.

Following several days of hearings, the trial examiner, in a well-reasoned and well-documented decision,[1] approved by the Board,[2] upheld the unfair labor practice charges and ordered

(a) the reinstatement of one of the employees, Moll,

(b) certain payments to the estate of the other employee, Gibson,[3] and

(c) other affirmative action by the employer.

The petitioner-corporation seeks to set aside the Board order approving the decision of the trial examiner, contending, *inter alia,* that the employees were properly fired for cause and that they had not been engaged in concerted activities but rather had "acted individually and independently . . . reflecting solely their own views." (Petitioner's brief, p. 6). The Board has countered with a request for enforcement of its order.

It does not appear to be disputed that the subject matter of the discharged employees' protest, the company's profit-sharing plan, concerns a term or condition of employment. Nor is it contended that the activities of the employees, if concerted, were unlawful.

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[1] Appendix (App.) 6.

[2] 171 N.L.R.B. No. 145, June 5, 1968.

[3] Gibson died before the hearings were held. (App. 23.)

Appendix A

The trial examiner's decision adopted by the Board held that the petitioner was guilty of an unfair labor practice for interfering with employee conduct found to be concerted activities under § 7 of the National Labor Relations Act which provides, in pertinent part:

> Employees shall have the right . . . to engage in . . . concerted activities . . . for the purpose of . . . mutual aid and protection. 29 U.S.C.A. § 157.[4]

The lines defining this right have of necessity been painted with broad strokes. To protect concerted activities in full bloom, protection must necessarily be extended to "intended, contemplated or even referred to" group action, Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964), discussed further *infra,* lest employer retaliation destroy the bud of employee initiative aimed at bettering terms of employment and working conditions.

The mantle of protection of concerted activities, the various circuit courts have held,[5] extends to both union and nonunion employees.[6]

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[4] Section 8(a)(1) of the Act, 29 U.S.C.A. § 158, makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in § 7 of the Act.

[5] Elam v. NLRB, 395 F.2d 611 (D.C. Cir. 1968); Indiana Gear Works v. NLRB, 371 F.2d 273, 276 (7th Cir. 1967); NLRB v. Kearney & Trecker Corp., 237 F.2d 416, 420 (7th Cir. 1956); Southern Oxygen Co. v. NLRB, 213 F.2d 738, 741 (4th Cir. 1954); Salt River Valley Water Users' Ass'n. v. NLRB, 206 F.2d 325, 328 (9th Cir. 1953); NLRB v. J. I. Case Co., 198 F.2d 919, 922 (8th Cir. 1952), *cert. denied,* 345 U.S. 917 (1953); Modern Motors, Inc. v. NLRB, 198 F.2d 925 (8th Cir. 1952); Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 752 (4th Cir. 1949); NLRB v. Phoenix Mut. Life Ins. Co., 167 F.2d 983, 988 (7th Cir.), *cert. denied,* 335 U.S. 845 (1948); and NLRB v. Schwartz, 146 F.2d 773, 774 (5th Cir. 1945).

[6] Apparently petitioner's plant was not unionized.

"The joining in protests or demands, even by a small group of

Appendix A

Section 7 of the Act is designed to guarantee to employees the fundamental right to present grievances to their employer to secure better terms and conditions of employment, even if the presentation of a grievance requires a work stoppage: NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962); NLRB v. Serv-Air, Inc., 401 F.2d 363 (10th Cir. 1968).

Although a single employee's encouragement of individual fellow workers to present grievances has not been protected, Indiana Gear Works v. NLRB, 371 F.2d 273 (7th Cir. 1967), Mushroom Transportation Co. v. NLRB, *supra,* Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749 (4th Cir. 1959); Union Carbide Corp., 171 N.L.R.B. No. 199, 69 LRRM 1086 (1968), a single employee attempting to induce fellow workers to join in a petition regarding a common grievance is protected, Salt River Valley Users' Ass'n. v. NLRB, 206 F.2d 325 (9th Cir. 1953), Joanna Cotton Mills Co. v. NLRB, *supra,* as is the right of an individual employee presenting grievances on behalf of others, NLRB v. Guernsey-Muskingum Elec. Co-op., Inc., 285 F.2d 8 (6th Cir. 1960). Indeed, the Ninth Circuit, applying the Third Circuit test set out in Mushroom Transportation Co. v. NLRB, *supra,* held that a single nonunion employee's verbal support of a *threatened* strike by the union was protected and that the employee's discharge by the em-

---

employees, if in furtherance of their interests as such, is a concerted activity protected by the act. It is not necessary that union activity be involved or that collective bargaining be contemplated." Annot. 6 A.L.R.2d 416, 434 (1949). *See also* NLRB v. Western Meat Packers, Inc., 368 F.2d 65, 71 n. 13 (10th Cir. 1966); Annot., 19 A.L.R.2d 566 (1951). In Owens-Corning Fiberglass Corp. v. NLRB, 407 F.2d 1357, 1363 (4th Cir. 1969), the protest and concerted activity related to the lack of a company policy for quickly getting employees home in times of personal tragedy.

ployer was an interference with his § 7 rights. Signal Oil and Gas Co. v. NLRB, 390 F.2d 338 (9th Cir. 1968). In Owens-Corning Fiberglass Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969), the court said:

> . . . The activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much "concerted activity" as is ordinary group activity. The one seldom exists without the other.

"Mere griping" about a condition of employment is not protected, but when the "griping" coalesces with expression inclined to produce group or representative action, the statute protects the activity: Mushroom Transportation Co. v. NLRB, *supra*. The stimulus which caused the coalescence of a grievance and concert of action may, of course, be initiated by the employee, but the coalescence may also be triggered by an action of or a failure to act by management.

In NLRB v. Washington Aluminum Co., *supra*, several employees had complained individually to management about the lack of heat in the plant. Management failed to remedy the situation. On an especially cold morning, several employees thought it was too cold to work. After a brief discussion among themselves, and without notifying any member of management who might be able to effect a remedy, the employees, in unison, walked out of the plant. Those who walked out were discharged. The walkout, the only concerted activity, was in response to a situation which management had failed to remedy; it was held by the Supreme Court to be protected under the Act.

Appendix A

In Modern Motors, Inc. v. NLRB, 198 F.2d 925 (8th Cir. 1952), the protected activity was a refusal to go back to work. Indeed, the suggestion that the employees leave the premises came from the employer:[7]

> The concerted activities involved were prompted by the employer's failure at Christmastime in 1949 to pay an employees' bonus as had been done during a number of preceding years. On the morning following the Christmas holiday, eleven of the employees in the employer's shop insisted upon an opportunity to

[7] See Elam v. NLRB, 395 F.2d 611 (D.C. Cir. 1968), and Morrison-Knudsen Co. v. NLRB, 358 F.2d 411 (9th Cir. 1966), for similar factual situations and results. Hoover Design Corp. v. NLRB, 167 N.L.R.B. No. 62, *enf'd*, 402 F.2d 987 (6th Cir. 1968), involved an employee who generated protest and dissatisfaction among other employees because the employer reneged on a promise to give premium pay for a Thanksgiving holiday weekend. The employee's discharge was held to violate § 8(a)(1).

Also relevant is NLRB v. Kennametal, Inc., 182 F.2d 817, 818 (3d Cir. 1950):

> . . . On January 31, 1947, seven or eight employees were gathered around a water fountain during working hours discussing a wage increase which had reportedly been won after a strike at a neighboring plant. Some one suggested that the group should immediately present its wage grievances to Philip McKenna, respondent's president. . . .
>
> Four days after the meeting . . . [with the president], respondent's officers decided to discharge . . . four men because they were leaders in the work stoppage. . . .

Judge Goodrich observed:

> . . . What occurred . . . was certainly a concerted activity for the purpose of collective bargaining, the kind of activity which is expressly protected by Section 7 of the Act. That the employees suddenly dropped their tools and insisted upon presenting their grievances during working hours does not detract from the lawfulness of their conduct. . . . [Footnote omitted.] 182 F.2d at 819.

> discuss the matter with the president of the Company. Two of their number acted as spokesmen for the group. The president declared that the Company could not afford to pay a bonus that year and directed all of them either to go back to work or leave the premises. The two spokesmen replied that they felt that they were entitled to seek legal advice. They left the shop and went downtown to find and consult with a lawyer. They suggested to the other nine that they not go back to work until their return. When the president came out into the shop a few minutes later and learned that the two spokesmen had left the premises, he announced that they were fired and ordered the rest to "go to work or get your tools and leave the building." All of the nine, except one, returned to their jobs. . . . When the two spokesmen came back . . . [all three were fired. The Board's order, including reinstatement and back pay for the three discharged employees, was enforced.] 198 F.2d 925-926.

The cohesiveness of the concerted activity need not be more than the suggestion of group action. In fact, the existence of a "group" need not be communicated to management, as asserted by petitioner in its brief (p. 39).[8] The Sixth Circuit has stated that, "The mere fact that the . . . [employees] did not formally choose a spokesman or that they did not go together to see . . . [management's representative] does not negative concert of action. It is

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[8] As the examiner found, and as we point out later, petitioner was sufficiently aware of the complaints of the lack of the profit-sharing contribution to charge it with knowledge of the concerted activities found to be present in this case.

sufficient to constitute concert of action if from all of the facts and circumstances in the case a reasonable inference can be drawn that the men involved considered that they had a grievance . . ." NLRB v. Guernsey-Muskingum Elec. Co-op., Inc., *supra* at 12.[9]

The grievance in *Guernsey* involved the appointment of Larry Miller, a son-in-law of a company executive, as foreman. His father-in-law announced the appointment to some of the employees as follows: "Now, Larry don't know a damn thing about it, but he is going to be your foreman." The other employees, who felt that one of their own number would be more qualified for the supervisory post, discussed the problem among themselves, and at various times each man in the crew went individually to complain to a management representative. The company's general manager was "damned unhappy" about the complaints of the employees so he fired one of them for "cause." This was held to be an unfair labor practice. Even though the employees had not communicated that a "group" had existed, and management may have inferred that it was dealing with individual gripes, the consensus of the affected, unhappy employees was sufficient to support a finding that the activity was in concert and, therefore, protected.

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[9] The quotation from the *Guernsey* case continues by stating the following prerequisite: "and decided among themselves, that they would take it up with management. . . ." 285 F.2d at 12.

In the *Washington Aluminum Co.* case, the Supreme Court has modified this requirement in the following manner:

> We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they did not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. . . . 370 U.S. at 14.

In short, the law recognizes that employees have a legitimate interest in "acting concertedly to make their views known to management without being discharged for that interest." NLRB v. Phoenix Mut. Life Ins. Co., 167 F.2d 983, 988 (7th Cir.), *cert. denied*, 335 U.S. 845 (1948); NLRB v. City Yellow Cab Co., 344 F.2d 575, 582 (6th Cir. 1965).

As stated briefly in the opening part of the opinion, the events in this appeal began when the petitioner informed its employees that it was going to retool and invest in equipment and supplies so there would be little, if any, money payable as a contribution to the profit-sharing plan for the year 1966. This news was conveyed to the employees who are the subject of the unfair labor practice charge, as well as to others, by Bruce Minnier, tool room foreman. He had been instructed by management that when he distributed the profit sharing statements he was to make sure to get "across to the employees why there wasn't a contribution made." (App. 116.)

When Minnier spoke to tool room employees Moll and Gibson individually, they both complained (App. 66-67, 147-148, 164). In the presence of some other employees, Gibson loudly announced his dissatisfaction[10] to maintenance supervisor, James Howard, as the latter walked through the machine shop (App. 147-148, 152). Howard tried to explain to Gibson the reason for the company's action

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[10] In Gibson's affidavit (General Counsel's Exhibit No. 5, App. 30), he said in connection with the profit-sharing plan: "Last year, in the 1965 period, we also got only a small sum so this was especially disturbing because in earlier years we had been getting about $900 each year."

More precisely, Gibson's profit-sharing record (General Counsel's Exhibit 7, App. 39) showed the company's contribution to and his interest in the profit-sharing plan in 1965 to be $238.86 with a high of $952.01 for 1963 and a prior low of $668.51 for 1960.

(*Id.*) Howard later reported the incident to Gibson's direct supervisor, Minnier (App. 181).

When some of the employees complained individually to Minnier about the proft-sharing plan, he told them there would be a meeting later in the afternoon to discuss "the whys and wherefores of the contribution this year." (App. 164). There is some disagreement between the parties as to whether Minnier decided to hold the meeting because of the complaints, or whether he had been initially instructed even before handing out the profit-sharing statements to hold a meeting, or whether his instructions were to have a meeting if it became necessary to do so in order to explain the company's action. (See NLRB brief, p. 3; petitioner's brief, p. 3 n. 1.) We do not believe this factual issue is crucial. Even if management had decided to call the meeting in the first place, the protests about the profit-sharing plan which preceded and followed it, and the questions raised and suggestions made at the meeting, are sufficient in our view to fit in the mold of "group action," which is considered to be an element of concerted activities under § 7: Mushroom Transportation Co. v. NLRB, *supra* at 685.

At the meeting Minnier again explained why there was to be little or no contribution to the profit-sharing plan. After Minnier made his remarks, he solicited comments from those present. One employee, William Yoxheimer, expressed suspicion at the petitioner's failure to provide the employees with a copy of the profit-sharing plan and suggested that the company do so (App. 71, 165). Gibson concurred in this suggestion (App. 72-73). Another employee, Russell Haas, urged that the company make some contribution to the profit-sharing plan even if most of the profits were invested back into the company (App. 71, 165). Gibson and Moll expressed concurrence in this suggestion

(App. 72, 208). Minnier's response to these points was "to have faith in the company." (App. 72.)

Minnier then reported the events of the meeting to his superiors who, in turn, informed the president of petitioner-company, Miss Mary Pich (App. 116-118). When she was told that Gibson and Moll, while complaining about the profit-sharing plan, had made derogatory remarks about the company, President Pich asked to see their personnel files. In examining the files she discovered some adverse information about both employees.[11] Miss Pich then talked to counsel for the company and, after describing the situation, she was advised to dismiss Moll and Gibson (App. 134-135).[12]

The following morning, June 19, 1967, before the men were fired, employee Yoxheimer brought to the plant a

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[11] Generally, Moll's personnel file disclosed prior warnings for horseplay, for absenteeism, and for "not attending to his job" by "socializing" with other employees. Gibson's file contained information about refusal to follow suggestions and orders of his supervisors, and wandering around the plant bothering other employees. (App. 158-162.)

[12] The bona fides of petitioner's action in discharging the two employees is not directly relevant to a determination of their rights. In NLRB v. Western Meat Packers, Inc., 368 F.2d 65, 69 n. 9 (10th Cir. 1966), the court declared:

> Even though a discharge is motivated by an employer's good faith belief that the employee has engaged in misconduct in the course of a protected activity, if the belief is erroneous, the discharge may be violative of § 8(a)(1) of the Act. National Labor Relations Board v. Burnup & Sims, 379 U.S. 21, 85 S.Ct. 171, 13 L.E.2d 1 (1964).

Whether or not the complaint concerning the profit-sharing plan was legitimate also is not material. As the court said in NLRB v. Halsey W. Taylor Co., 342 F.2d 406, 408 (6th Cir. 1965)

> We are not concerned in this case with the merit or lack of merit of Weekley's grievance. But it is clear that Sec. 7 protects his right to utter it as a matter of concerted activity with other employees for mutual aid.

clipping from the help wanted column of the local newspaper. It was an advertisement for a secretary which told about the company's "excellent benefits including an outstanding profit-sharing plan." Yoxheimer handed the clipping to Moll, who, in turn, handed it to Minnier, stating, "I'm going to put this with my profit-sharing statement so when I get in the office again and they bring up the profit-sharing plan up, why, I'll have it to show to Miss Lane [the personnel director]." (App. 91, 170.)[13] After reading the clipping, Minnier went directly to the personnel office (App. 77). As he did, Gibson came over to Moll and said, "Isn't that something." (App. 76-78).

At the end of the day, on June 19, 1967, Moll was fired. In a meeting held in the personnel office Minnier said to him, "Bill . . . since you are no longer satisfied here we are going to let you go." (App. 80, 171.)

Gibson was next. When he came to the personnel office, Minnier said, "Ed, we've been reviewing your feelings and since you aren't happy with the company we decided to leave you go." (App. 182.)[14]

Prior to their discharge on June 19, 1967, Moll had worked for the company for over 7 years and Gibson for 3½ years. Each had received periodic raises and had on occasion been complimented for their work (App. 82-83, 100, 125, 131-133, 196-200).

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[13] In prior testimony, Moll recalled the facts as follows: "When he gave me the profit-sharing statement I told him that I was going to put it in my tool box and save it for when Miss Lane brought the profit sharing up when we were at any sort of a *meeting*." (App. 77, 170.) . (Emphasis added.)

[14] Minnier's testimony as to what he said differs from plant manager Bidelspach's recollection of the conversation. Bidelspach testified that Minnier said, "Ed, since you aren't happy with this company and you aren't performing your work satisfactory we decided to call it quits with you." (App. 126.)

Appendix A

The day following the discharge of Moll and Gibson, the company called a special meeting of the other employees and informed them that the dismissals were due to the poor attitude and work performance of Moll and Gibson, and had nothing to do with their complaints about the profit-sharing plan. (App. 119-120.)

We conclude upon an examination of the record that there was sufficient evidence to support the finding of the trial examiner that Moll and Gibson were discharged because of their activities in response to the profit-sharing announcement.[15] It may be that neither was an ideal[16] or even acceptable employee, but the policy and protection provided by the National Labor Relations Act does not allow the employer to substitute "good" reasons for "real" reasons when the purpose of the discharge is to retaliate for an employee's concerted activities. It is clear that the "real" stimulus for the discharges here was each employee's conduct in response to the lack of a contribution by the petitioner to the profit-sharing plan.

In NLRB v. Electric City Dyeing Co., 178 F.2d 980 (3d Cir. 1950), this court had occasion to rule on a comparable

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[15] Bidelspach testified that as soon as he heard that Moll and Gibson had made some derogatory remarks about the company in regard to the profit-sharing plan, he called for the personnel files and reported to President Pich. (App. 117.) Petitioner's counsel stipulated that President Pich had called him on Monday, June 19, and informed him of Moll's (and presuambly Gibson's) personnel files and that they had made derogatory remarks regarding the profit-sharing plan. Counsel advised petitioner to fire the employees. (App. 134-135.)

[16] The trial examiner observed:

> In my disposition of this case I do not want to give the impression that I believe or find that Moll and Gibson were perfect employees devoid of any faults or shortcomings. I am sure that they had their deficiencies as do most employees. (App. 18 n. 13.)

situation where the employer alleged that certain employees were discharged for unsatisfactory work whereas the Board made a finding, in which we concurred, that the dismissals were for union activity. Judge Goodrich, speaking for the court, said, 178 F.2d at 983:

> Bernard Czankner seems to be the weakest of the helpers discharged. He was probably guilty of sloppy packing, and Heilig testified that he should have been discharged five months earlier. But for some time prior to the discharges, respondents had a list of over forty persons seeking employment, and we cannot say that the Board gave undue weight to the timing of the discharge, which closely followed Czankner's presence at the union meeting. Czankner's work apparently became intolerable only after he had joined the union. Cf. Agwilines, Inc. v. N.L.R.B., 5 Cir., 1936, 87 F.2d 146, 154. Moreover, *it matters not that for reasons apart from the union [concerted] activity an employee deserves summary discharge if as a fact the reason was union [concerted] activity.* Edward G. Budd Mfg. Co. v. N.L.R.B., 3 Cir., 1942, 138 F.2d 86, 90, certiorari denied, 1944, 321 U.S. 778, 64 S. Ct. 619, 88 L.Ed. 1071. (Emphasis added.)

We have reiterated this same principle in subsequent cases.

In NLRB v. Buitoni Foods Corp., 298 F.2d 169, 174 (3d Cir. 1962), we said:

> We observe preliminarily that where, as here, contradictory reasons for the discharge of an employee are advanced, it is the responsibility of the Board to weigh the evidence and resolve the factual conflict . . .

Appendix A

> There is clearly no obligation on the Board to accept at face value the reason advanced by the employer. The concurrent existence of an otherwise valid reason for the discharge of an employee does not preclude a factual determination that his discharge was discriminatory if it appears from a preponderance of evidence, and the reasonable inferences drawn therefrom, that the discharge was in fact motivated by the employer's opposition to the employee's union activities. . . .[17]

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[17] In a case involving a comparable provision of the Virgin Islands Labor Law, Virgin Islands Labor Union v. Caribe Constr. Co., 343 F.2d 364, 368 (3d Cir. 1965), in assessing the evidence presented before the Deputy Commissioner of Labor, we said:

> All this would support an inference that a causal relationship existed between the abrupt dismissal of the men and their joining the Union [footnote omitted]. The Commissioner's "function was to determine the real reason for the discharges and whether the reasons given by the employer were mere pretexts. In so doing [he] has the right to consider circumstantial evidence and draw inferences therefrom as direct evidence is not always obtainable" . . . We do not, of course, intimate that the fact finder was required to draw the inference that the dismissals were the result of union activity, but only that such an inference was permissible on the evidence in the record. . . .

In a Sixth Circuit case, the court said:

> Respondent contends that he [the employee] was discharged for an accumulation of acts of irresponsibility, insubordination and inefficiency and not because of union activity.
>
> In determining this question, we apply the well-settled rule that if Hetrick's discharge was motivated wholly or *even in part* by his union activity, it was illegal despite the existence of adequate cause for firing him. . . . [Emphasis added.] NLRB v. Barberton Plastics Products, Inc., 354 F.2d 66, 68 (6th Cir. 1965). *See also* Reading & Bates, Inc. v. NLRB, 403 F.2d 9, 11 (5th Cir. 1968); Betts Baking Co. v. NLRB, 380 F.2d 199, 203 (10th Cir. 1967); Annot., 83 A.L.R.2d 532, 540 (1962).

In some cases the courts have found that the conduct of an employee was so improper that his discharge was justified in spite of the fact he was also engaged in protected activities: Cain's

Appendix A

It should be noted that in *Buitoni,* there was alleged to be a "concurrent reason" for discharging the employee, viz., violence on the picket line, which the examiner and the Board did not entirely accept. In our case the claimed unsatisfactory work record was not even concurrent but had occurred well before the activities involved in this appeal.[18]

In its brief, petitioner contends that in order to constitute concerted activity in violation of § 7 of the Act, this

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Coffee Co. v. NLRB, 404 F.2d 1172 (10th Cir. 1968); NLRB v. Red Top Cab & Baggage Co., 383 F.2d 547 (5th Cir. 1967); Southern Oxygen Co. v. NLRB, 213 F.2d 738 (4th Cir. 1954.) In *Cain's Coffee* and *Red Top* the court refused to enforce the order of the Board because it concluded that the finding of anti-union motivation for the discharge was not supported by substantial evidence.

Southern Oxygen is clearly distinguishable. There, the employer, prior to the occurrence of any activities claimed to be protected, had announced a plan to decentralize operations requiring reduction in the work force. The four employees who were discharged had engaged in protected conduct but there was not sufficient evidence to show that the discharge stemmed from their concerted activities. It was found that the company's stated reason for the discharge, the reduction of the work force, was not colored by a desire to stifle the concerted activities in issue.

In the instant appeal in Wilson, we believe there is substantial evidence in the record to support the Board's determination that the petitioner's motivation for the discharge of Moll and Gibson was their disturbing protest against the failure of the company to contribute to the profit-sharing plan.

[18] In NLRB v. Rubber Rolls, Inc., 388 F.2d 71, 74 (3d Cir. 1967), a union activity case, Judge Freedman reiterated the position of this circuit. An employer may not use a pretext " 'dredged up . . . from the bottom of the barrel . . . to cover up . . . the actual reason for the discharge, . . .' " when the real reason is protected activity.

In Hoover Design Corp. v. NLRB, 167 N.L.R.B. No. 62, *enf'd,* 402 F.2d 987 (6th Cir. 1968), the Board said:

> . . . Of course the Company could have discharged Vogt at any time during his employment for poor attendance or for any other reason [the employee also had a drinking problem] but they could not legally discharge him for his concerted activities on the pay issue or discharge him under circumstances when Vogt's protected activity was the precipitating, proximate and material cause of the discharge. . . .

court has said that the employees' conduct must contemplate some sort of "group action," Mushroom Transportation Co. v. NLRB, *supra,* otherwise their protests are mere griping. In support of its claim that there was no group action here, petitioner has constructed a chart listing each statement by Moll and Gibson which could in any way be related to their "concerted activity" and has characterized each such statement as being an "individual gripe, comment or suggestion" and not "group action intended, contemplated or referred to." (Brief, pp. 30-32.)

We believe petitioner takes too narrow a view of each statement or act of the employees in isolation. It is the totality of their conduct, their complaints to Minnier and others prior to the meeting, their participation in the June 16 meeting in which certain suggestions and ideas were generated, the consternation which their remarks and behavior caused the petitioner's top managment, and the post-discharge meeting with the other employees to explain what had happened, which supports the Board's conclusion that Moll and Gibson reflected a general dissatisfaction which manifested itself, however inartfully, in the desire to do something about the disappointing profit-sharing contribution which could adversely affect the employees' ultimate retirement benefits.

As previously indicated, at the meeting called by Minnier, the discharged employees, Moll and Gibson, not only continued their prior protest against the employer's decision with respect to the profit-sharing plan but also concurred in suggested remedies put forward by other employees. Although the meeting was called by management, it was no doubt called because of the general dissatisfaction anticipated from or expressed by the employees under Minnier's supervision. The vocalization of this dissatisfaction

on behalf of the employees by Moll and Gibson and others constituted sufficient "group action" to come within the protected concerted activities under the statute.

In substance, the employees had a gripe. They assembled. They presented their grievance to management, represented at the meeting by Minnier. Standing alone, we believe this was concerted activity sufficient to shield Moll and Gibson from discharge as a result of their protests. Moreover, Moll's indication the day following the meeting that he wanted to show management the "want ad" given to him by Yoxheimer, and Minnier's immediate response by going to the personnel office, further reflects Moll's desire to act for himself and for the group of employees adversely affected with respect to the profit-sharing plan and reveals that the discharges were directly related to the concerted activity in which the employees were engaged.

Both parties in this appeal rely on Mushroom Transportation Co. v. NLRB, *supra,* where we said:

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.[19] 330 F.2d at 685.

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[19] The court continued:
This is not to say that preliminary discussions are disqualified as concerted activities merely because they have not resulted in organized action or in positive steps toward presenting demands. We recognize the validity of the argument that, inasmuch as almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection

We believe that the facts here meet and surpass the threshold of concerted activity test which *Mushroom* established.

It should be pointed out that a violation of the Act was not found in *Mushroom*. In that case, a part-time or "extra" nonunion employee, during work hours, advised other employees of their various "rights" under the existing collective bargaining contract which had been negotiated by the union for the full-time employees. There was no evidence in the case that any of the "grievances" involved a group of employees or that the discharged employee, Keeler, had any intention of forming any such group. In refusing to enforce the order of the Board, the court said:

> We look in vain for evidence that would support a finding that Keeler's talks with his fellow employees involved any effort on his or their part to initiate or promote any concerted action to do anything about the various matters as to which Keeler advised the men or to do anything about any complaints and grievances which they may have discussed with him. . . . 330 F. 2d at 684-685.

In other words, we held that mere conversations between employees do not come "within the ambit of activities protected by the Act . . ." How different the *Mushroom* case is, then, from the facts at bar where the two discharged employees and others complained about the profit-sharing plan arrangement, and the employer found it necessary to hold two meetings to deal with the problem, in the first of

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because of lack of fruition. However, that argument loses much of its force when it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to. 330 F.2d at 685.

which the discharged employees participated and helped to generate suggestions for dealing with their grievance. Certainly, as the Board suggests, this conduct comes at least within that part of the *Mushroom* test holding that "a conversation may constitute a concerted activity" if it appears "that it had some relation to group action in the interest of the employees."

Two more points should be covered briefly on the prime issue of concerted activity. Petitioner contends that there must be a spokesman for the employees leading the call for group action, and that the employer must have knowledge that the employees are engaged in concerted action.

With respect to the "spokesman" question, NLRB v. Guernsey-Muskingum Elec. Co-op., Inc., *supra,* expressly held that there is no need for a formal selection of a spokesman. "It is sufficient to constitute concert of action if from all the facts and circumstances in the case a reasonable inference can be drawn that the men involved considered that they had a grievance and decided, among themselves, that they would take it up with management." 285 F.2d at 12.

Furthermore, a spokesman may be a voluntary one or a chosen representative. Here, it might be said that Moll and Gibson were volunteers in speaking and protesting for themselves and on behalf of other employees of petitioner.

With respect to knowledge of the concerted activity, it is difficult to believe that at the time the officers of the petitioner decided to effect the discharges they were unaware of the dissatisfaction pulsating in the plant, at least in the tool room, which the trial examiner properly held to constitute protected concerted activity.

Finally, petitioner has laid great stress on the fact that both Moll and Gibson indulged in considerable pro-

fanity in the course of their protests. The Supreme Court has held, and we apply the principle here, that in balancing the rights of the employer and the employees, as long as the activities engaged in are lawful and the character of the conduct is not *indefensible* in the context of the grievance involved, the employees are protected under § 7 of the act: NLRB v. Washington Aluminum Co., *supra* at 17. See generally, Falcon Plastics v. NLRB, 397 F.2d 965 (9th Cir. 1968).

We cannot agree that the measure of profanity in which the discharged employees indulged here was completely unusual and totally indefensible in the context of their claimed grievance.[20]

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[20] In dealing with this particular issue, the trial examiner commented, I have heard it said that with the possible exception of the Australians, Americans use more profanity and coarse language in their day to day conversations than any other people in the world.

It is common knowledge that some of the worst of this trait occurs among factory workers. Indeed, Minnier admitted that profanity was used throughout the machine shop. He further testified, incidently [sic] that Moll was no worse than other employees in this respect. . . . App. 19.

While the recognition of the validity of what the trial examiner said may not rise to the dignity of judicial notice, we all know that factory workers tend not to be angelic and that the rough or sordid language of the street in a plant or a shop is not a normal cause for dismissal. *Cf. Watts* v. *United States,* U.S. , (1969), where the Court said:

> . . . The language of the political arena, *like the language used in labor disputes,* see Linn v. United Plant Guard Workers of America, 383 U.S. 53, 58 (1966), is often vituperative, abusive and inexact. (Emphasis added.)

Cf. Owens-Corning Fiberglass Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969), where misstatements of fact in a handbill distributed by one of the employees discharged for concerted activity were held insufficient to justify the firing.

We have considered the other points raised by petitioner in the able and comprehensive brief of counsel and find them not to warrant any different result.[21]

From a review of the record as a whole we conclude that there is substantial evidence to support the findings of the trial examiner and the action of the Board in the relief which it has ordered.[22]

Petitioner's request to set aside the Board's order will be denied. The request of the Board for enforcement of its order will be granted.

KALODNER, *Circuit Judge,* dissenting

I would deny the petition of the National Labor Relations Board for enforcement of its Order and grant the petition of the Hugh H. Wilson Corporation to set aside the Board's Order.

I would do so for the reason that the evidence establishes that the discharged employees were not engaged in protected "concerted activity" when they expressed their criticism of the employer's conduct unaccompanied by an

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[21] In view of Gibson's death before the hearing, a question arose as to the admissibility of Moll's testimony and that of others with respect to what Gibson said or did. Petitioner contended the evidence was inadmissible as hearsay. We agree with the Board that while the testimony of Moll and others as to Gibson may have been hearsay, it was admissible as a well-recognized exception to the rule because the examiner was concerned not with the truth of what Gibson is alleged to have said but whether or not he actually said it. (NLRB brief, p. 12.)

[22] In Reading & Bates, Inc. v. NLRB, 403 F.2d 9, 11 (5th Cir. 1968), the court said:

> . . . Our only inquiry is whether the Board's findings are founded on "substantial evidence," considering the record as a whole. Universal Camera Corp. v. NLRB, 1950, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456.

indicated intention to initiate or promote any concerted action by their fellow employees.

The instant situation is clearly governed by Mushroom Transportation Company, Inc. v. National Labor Relations Board, 330 F.2d 683 (3 Cir. 1964). There, the question presented was whether an employee's statements to his co-workers that "they were not getting what they were entitled to" under the existing contract constituted "concerted activity" protected by the National Labor Relations Act.

In answering that question in the negative we held that a conversation between employees is not protected by the Act as "concerted activity" merely because it relates to employees' interests and that it must at least have the object of initiating, inducing or preparing for group action or have some relation to group action in the interests of employees.

Our holding in *Mushroom* was subscribed to and applied in Indiana Gear Works v. National Labor Relations Board, 371 F.2d 273 (7 Cir. 1967) where enforcement was denied of the Board's Order which was premised on its finding that the employer had discharged an employee for allegedly engaging in "concerted activity".

In *Indiana Gear* the Court said at page 276:

> "To support the Board's findings, there must be substantial evidence in the record that Packard was engaged in a concerted activity for the purpose of mutual aid or protection, and that the employer had knowledge of the concerted nature of the activity at the time it discharged the employee. Mushroom Transportation Company v. N.L.R.B., 3 Cir. (1964), 330 F.2d 683; N.L.R.B. v. Ford Radio & Mica Corp., 2 Cir. (1958), 258 F.2d 457; N.L.R.B. v. Office Towel Supply Co., Inc.,

2 Cir. (1953), 201 F2d 838. It has been held that a complaint or gripe by an employee is not a concerted activity, Mushroom Transportation Company v. N.L.R.B., supra, 330 F.2d at 685, even though addressed to other employees. N.L.R.B. v. Office Towel Supply Co., Inc., supra, 201 F.2d at 841."

The evidence in the instant case establishes that everything said by the discharged employees was no more than an expression of their dissatisfaction with respect to the employer's announcement that it would, for pressing financial reasons, be unable to make contributions to its profit-sharing plan for the year 1966. These expressions were nothing more than "griping" and could not by any stretch of the imagination be said to attain the dimension of an intention or attempt to initiate or promote concerted action by their fellow employees.

There is still another reason why the Board's petition for enforcement of its Order should be denied and that of the employer should be granted.

There was lacking in the instant case substantial evidence to support the trial examiner's finding that the employer had knowledge of any "concerted activity" on the part of the discharged employees. The finding that the employer had such knowledge is, as the employer contends in his brief, "at best, sheer speculation, wholly unwarranted."

It is settled that to constitute a violation of Section 8(a)(1) of the Act it is imperative the evidence must establish that the employer has knowledge of the concerted nature of the employee's activity. National Labor Relations Board v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964).

Appendix A

In conclusion, it must be said that the majority has not given effect to the teaching that

> "Courts should be 'slow to overturn an administrative decision,' *Labor Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112, but they are not left 'to "sheer acceptance" of the Board's conclusions,' *Republic Aviation Corp* v. *Labor Board*, 324 U.S. 793, 803."

and

> "Courts must, . . . set aside Board decisions which rest on an 'erroneous legal foundation.' *Labor Board* v. *Babcock & Wilcox, Co., supra,* at 112-113." National Labor Relations Board v. Brown, et al., 380 U.S. 278, 291, 292 (1965).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Judgment of the United States Court of Appeals For the Sixth Circuit

JUDGMENT

Before: McLaughlin, Kalodner and Stahl, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of Hugh H. Wilson Corporation, to review and set aside a certain order of the National Labor Relations Board issued against it on June 5, 1968, and the Board's cross-application for enforcement of said order. The Court heard argument of respective counsel on January 24, 1969, and has considered the briefs and transcript of record filed in this cause. On July 3, 1969, the Court being fully advised in the premises, handed down its opinion denying the Company's petition for review, and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, IT IS ORDERED AND ADJUDGED by the United States Court of Appeals for the Third Circuit that the Company's petition for review be and it hereby is denied and that the said order of the National Labor Relations Board in said proceeding be enforced, and that Hugh H. Wilson Corporation, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that cost shall be taxed against Petitioner.

BY THE COURT
DAVID STAHL
Circuit Judge

DATED: August 4, 1969

APPENDIX C

Decisions and Orders of the National Labor Relations Board and Trial Examiner

On February 2, 1968, Trial Examiner Eugene E. Dixon issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief, and the General Counsel filed exceptions and a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board had reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Hugh H. Wilson Corporation, Sunbury, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Appendix C

Dated, Washington, D. C., June 5, 1968

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Frank W. McCulloch, Chairman

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John H. Fanning, Member

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Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

TRIAL EXAMINER'S DECISION

Statement of the Case

EUGENE E. DIXION, Trial Examiner: This proceeding, brought under Section 10(b) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act, was heard at Sunbury, Pennsylvania, on November 28 and 29, 1967. The consolidated complaint dated October 4, 1967, based on charges filed August 8 (Case 4—CA—4379), by William E. Moll, an individual and on August 24, 1967 (Case 4—CA—4392), by Edwin W. Gibson, an individual, was issued by the Regional Director for Region 4 (Philadelphia, Pennsylvania) on behalf of the General Counsel of the National Labor Relations Board, herein the General Counsel and the Board. It alleged that Respondent, Hugh H. Wilson Corporation, had interfered with, restrained, and coerced its employees by the discharge of the Charging Parties for engaging in protected, concerted activity in violation of Section 8(a)(1) of the Act.

Appendix C

In its duly filed answer Respondent denied the commission of any unfair labor practices.

Upon the entire record and from my observation of the witnesses, I make the following:

Findings of Fact

I. Respondent's Business

At all times material Respondent has maintained its principal office and place of business in Sunbury, Pennsylvania, where it is engaged in the manufacture of hair curlers and bobbypins. During the year preceding issuance of the complaint, Respondent, in the course and conduct of its business operations, produced and shipped goods valued in excess of $50,000 directly to States of the United States other than the Commonwealth of Pennsylvania. Respondent at all times material herein, has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Unfair Labor Practices

Background and Issues

This case involves the discharges on June 19, 1967, of Edwin W. Gibson who had worked for Respondent as a machinist from August 1959 and of William E. Moll who had been similarly employed by Respondent for 3½ years. Both employees had been participants along with other employees in Respondent's profit-sharing plan. The main question here is whether the two were discharged for engaging in a protest against the 1966 distribution to the employees under the plan as being protected, concerted activity, or whether what took place was not concerted activity but simply the employees' individual reactions of

disappointment to the distribution (not protected under the Act) and whether the two employees were discharged because of their past records and for cause. A subsidiary question involves the receipt in evidence and its use as evidence of an affidavit made about the matter by Gibson who died before the case came on for hearing.

As for the matter of the affidavit, while I am convinced it was properly receivable (see *American Guild of Variety Artists,* 163 NLRB No. 48, p. 13). I am also of the opinion that there is no need to rely on it in any respect whatsoever since I am convinced that the other evidence herein is sufficient upon which to make dispositive findings regarding Gibson's discharge as well as the other matters in the case. Accordingly, disregarding the affidavit, I turn to the main issue and the evidence regarding it as it came into the record.

William Moll's testimony

According to Moll's testimony, on June 16, 1967, his foreman, Bruce Minnier, handed him a sealed statement at his workbench pertaining to his current share of Respondent's profit-sharing plan. He opened it then and there and noticing that it was only about $22 increase over the previous year, he commented, "Well, that didn't amount to anything. I could work (here) 'till I'm 65 and wouldn't have anything to retire on." He then turned his attention to his work and Minnier continued passing out the profit-sharing statements to the rest of the employees. Minnier then returned to Moll's machine and as to what he said at this time, Moll testified as follows:

> Mr. Minnier came back and started discussing the profit-sharing plan with me and explaining that the company didn't give anything this year as they in-

> vested all their profit back into the company in new machines and that what we did get was from other employees who had left the company and it was their share that was divided among the employees, the remaining employees.

Shortly after this Minnier came back and asked the employees to assemble in the drafting room for a meeting. There Minnier told the employees essentially what he had told Moll previously and asked them if they had any questions. One employee asked why the Company did not furnish each employee with a booklet on the profit-sharing plan.[1] Another asked why the Company could not have invested some of its profits but also have set something aside to be added to the profit-sharing account. Both Moll and Gibson vocally indicated their agreement with this suggestion. Gibson also said that he thought that "if the profit-sharing was on the level" each employee "would . . . have a copy of what the profit-sharing was to do." Toward the end of the meeting, Minnier said, "Well, I'm still satisfied. I still have faith in the company." Moll said, "Sure, Bruce. How old are you?" When Minnier indicated he did not have too long to go until retirement, Moll said, "Sure, you have to have faith in the company. Where else can you go and get a job?" According to Moll, the meeting lasted about a half hour, having been called just before the end of the afternoon break, and was terminated just before quitting time—no one actually going back to work.

On the following Monday, Moll and Gibson discussed the profit-sharing matter together, and Moll discussed it with at least two other employees, Russell Haas and Bob

[1] There had never been anything in writing furnished to the employees by Respondent regarding the profit-sharing plan.

Maurer, all expressing their dissatisfaction about it. Also, according to Moll, the employees in their conversations and when they would pass one another would jokingly say, "Have faith."

The next day, William Yoxheimer (a fellow employee) brought a clipping from the Sunbury paper which involved an advertisement by the Respondent for a secretary listing among the job benefits an "outstanding profit-sharing plan." Yoxheimer gave the clipping to Moll saying, "Take a look at this, Bill." About this time Minnier happened to be coming by and Moll showed him the clipping saying, "I'm going to put this with my profit-sharing statement for when I get in the office." Minnier read the clipping and handed it back to Moll without comment. As Minnier walked away, Gibson walked over toward Moll and the latter showed him the clipping. Gibson remarked, "Isn't that something!" Minnier was no more than a few steps away at the time of Gibson's comment.[2] According to Moll's further testimony, he then went back to his work which at the moment was grinding core pins. Several times during the day, Minnier came in and said, "Let's keep at this job, Bill. I'd like to get it done today." According to Moll, Minnier had never approached him "in that fashion" to tell him to keep at a job before. Toward the end of the day, Minnier came to Moll and told him to go to the personnel office. Moll shut off his machine and did so. There, in addition to Minnier, Whittemore, the night foreman, and Bidelspach, the plant manager, were present. When he got there they told Moll to have a seat.

[2] According to Moll's further testimony, the clipping, when it was given to him by Yoxheimer, had the words, "Excellent benefits including outstanding profit-sharing plan" underlined in red. This is the way the clipping appeared when received in evidence as an exhibit.

Then Minnier said, "Well, Bill, since you're . . . no longer satisfied here we are going to let you go." Moll said, "Well, is that it?" And got up and started for the door. Bidelspach said that his check would be sent to him in a day or two. Moll went to get his tools ready to leave. While he was getting his tools together, Minnier came over and was standing behind him when Moll turned around. Moll said, "Don't feel bad about it, Bruce. I don't." Minnier said, "Yes, Bill, but I do." Moll then left.

That night, according to Moll's further testimony, he went to see Minnier at his home to see what recommendation Minnier would give him for a job. Minnier told him he would give him a good recommendation saying, "I don't care what Mary Lane[3] says, I'll give you a good recommendation." He also said to Moll, "You're doing all right in the tool room. If I was you I'd try and get another job in a tool room." Moll then said, "Well, Bruce, it was the profit-sharing that I got fired for, wasn't it?" Minnier replied, "No. You just weren't satisfied." Moll said, "Okay, Bruce. What wasn't I satisfied with? What else was I complaining with besides the profit-sharing plan?" Moll then said, "Now, it was the profit sharing, wasn't it?" According to Moll, Minnier did not give a verbal answer but nodded his head in assent.

According to Moll's further testimony, he had never received any warnings of any kind about his working conduct. His rate of pay when he started was $2.25 an hour and his rate at the time of his discharge was $2.54 an hour, having received a 10-cent raise a couple of months before he was discharged.[4]

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[3] Respondents personnel director.

[4] The raise actually was granted 4½ months prior to his discharge.

Appendix C

On cross-examination, Moll denied any reprimand about horseplay or about wasting time but then conceded he might have been spoken to on one occasion about using company time for social purposes. He also admitted having his "coming in late a time or two" mentioned to him but denied any mention about absenteeism. He also denied telling Minnier at the time he showed him the job advertisement that "this is a hell of a company." He also testified on cross that the only time he had ever expressed any dissatisfaction with his job was a year or so previously when he had said that he "would like a little more money, or something to that effect. . . ." It was at this time, according to Moll, that he was considering an offer of another job which he disclosed to Minnier. Even so, he did not say at this time that he was dissatisfied but merely said that his wife was making more money than he was. In any event, none of this came up at the time he got his 10-cent raise which he professed to be satisfied with.

Testimony of William R. Yoxheimer

Yoxheimer, called as as witness by the Respondent, testified on direct examination that he did not underline the words "on the job advertisement" which Moll claimed were underlined when Yoxheimer showed him the ad. On cross-examination, when asked if he could be mistaken about his testimony he answered, "Like I pointed out to Mr. Minnier and the gentlemen there (indicates Mr. Lewis), this happened 6 months ago. I would be lying to say that I didn't put them on but I definitely do not recall putting them on." In explaining why he gave Moll the clipping, Yoxheimer testified as follows:

> Well, we had been discussing this here profit-sharing plan that they have there and that seemed to be one

of the outstanding features that was under question, was the fact that there was supposed to be such an outstanding profit-sharing plan, and of course, as it probably was brought out, we did not receive any profit-sharing last year.

* * * * *

It was a general discussion among the fellows in the shop. As I recall, in this particular instance Bill and I were in the Grinding Room together. He was working on a machine that was adjacent to mine and that's how he and I come to become talking about it.

Testimony of Larry Bidelspach

Larry Bidelspach, Respondent's plant manager, testified that he had told his supervisors "to make sure that they got across to the employees why there wasn't a contribution made" to the profit-sharing fund for 1966. Pursuant to this instruction, Minnier held such a meeting and reported to Bidelspach "that there was general dissatisfaction that there wasn't a contribution made. . . ." He also reported that "Moll and Gibson had made some derogatory remarks about the company." Bidelspach's comment to Minnier at this time was "that it takes a lot of guts for someone to say 'I don't want the company using my money to buy new equipment.'" As a result of this information from Minnier, Bidelspach met with Respondent's president, Mary Pich, and discussed with her "primarily the derogatory remarks that were made . . . by . . . Moll and Gibson." Asked if he had discussed anything else he replied that they had, that they had discussed Moll's and Gibson's "past performance based on the personnel files." From the files they ascertained that "what it boiled down to" was that Moll "was constantly complaining about the company that

he wasn't making enough money and that (Respondent), just couldn't do anything to keep him happy." As for Gibson "The main thing there was that he had had a heart attack and (Respondent) had given him easier work and he wasn't doing this satisfactorily. He was wandering about the plant, not just in the department but into other departments."

Armed with this information, Miss Pich indicated that she was going to consult with Respondent's attorney. On June 19, Miss Pich conferred with Harold Whittemore, the night foreman, and Minnier and told them that she had been advised by Respondent's attorney to discharge Moll and Gibson. According to Bidelspach, this they did on the afternoon of June 20. He further testified that after the discharge he and Minnier called the employees together and told them that Moll and Gibson had been discharged because of their poor attitude and work performance and that the discharges were in no way connected with the profit-sharing plan. It was also pointed out to the employees at this time that although "other employees complained about the profit-sharing plan too . . . . they weren't discharged." No questions were asked at this time.

With respect to Gibson's discharge, Bidelspach testified on direct that when he got to the office and was seated, Minnier did the talking saying, "Ed, since you aren't happy with this company and you aren't performing your work satisfactory we decided to call it quits with you." Bidelspach was then asked if they had discussed at this time what work was not satisfactory and he answered yes. He then was asked what he referred to and his answer was, "Well, Ed's remark was, 'Aw, you're full of shit.'" He was then asked if anything was said about a job that took place the year before and he replied, "I don't recall.

No." He was then asked whether they discussed an assignment on a job that took place about a year before that when Gibson was working for the night supervisor and he answered, "I don't recall Bruce discussing that at that point. Bruce had mentioned to Ed about some jobs that wasn't performed satisfactory and this is when Ed became upset and said, "you're full of shit."

It was stipulated that if Respondent's counsel would testify he would testify that he advised Miss Pich to discharge Moll and Gibson on the grounds that "Moll was unhappy with the company, and; that as far this employee was concerned nothing the company did was right; that . . . he was constantly complaining, and; that he constantly complained that his wife was earning more money than he was . . . that after a profit-sharing meeting that was held by the supervisor of the machine shop . . . Moll kept saying that 'the company was no damn good';" and that Gibson "was another employee who similarly was also complaining; that the company had put up with this employee all this time because he was not well; that he had been warned about his work and attitude; and that he had complained to another foreman about the fact that he had not received any profit sharing."

Testimony of James S. Howard

Howard, a supervisor in the maintenance department, was called as a witness by Respondent and testified that on June 16, as he was walking through the machine shop, he was stopped by Gibson and asked why the Company did not make a contribution that year to the profit-sharing fund. Gibson appeared to be angry and spoke in a loud voice. Howard tried to explain why the Company had not made a contribution. According to Howard, he had

heard Gibson "do much griping." When asked on cross-examination to give a specific example of one of Gibson's gripes, Howard referred to the one about profit sharing. When asked for another one, Howard answered, "It's pretty hard to be specific because I talked to Ed several times and the one thing that he did complain about to me was that he thought that Bruce, Mr. Minnier, was unfair to him and sometimes assigned him a work project just to irritate him." According to Howard, this occurred about 6 months prior to Gibson's termination in June. When asked for any other instances of griping on Gibson's part the witness could supply no specific instances. From Howard's further testimony it appears that there are other employees in the plant that he would classify as gripers who are still employed.

Testimony of Bruce Minnier

Bruce Minnier, foreman of the toolroom, was called as a witness by Respondent. He testified that he had criticized Moll's work "on numerous occasions" citing (1) an occasion in November 1966 (supported by a document from Moll's personnel file dated November 10, 1966) for "horseplay and general joking around with the fellows"; (2) an occasion in February 1967 supported by another excerpt from Moll's personnel file where Moll's absentee record was the subject; (3) an occasion on March 1967 supported by another excerpt from Moll's personnel file dated March 15, 1967, pertaining to his "socializing" and the admonition to apply himself more on his work. Minnier also testified that Moll "was dissatisfied that he wasn't making enough money." He said his wife was making more money than he was which fact Moll mentioned to Minnier "a number of times." Moll, according to Minnier, had also said he might have to hunt another job.

Appendix C

When Minnier had distributed Moll's profit-sharing statement, Moll opened it and said, "there was very little added this time. If he worked there until he was 65 he wouldn't have anything to retire on . . . that this was a helluva company . . . last year we didn't get anything either." According to Minnier, others also commented when they got their statements from him and he told them that they "would have a meeting and discuss whys and wherefores of the contribution this year later on that afternoon."

The promised meeting was held about 2:30 that afternoon. About what he told the employees there, he testified as follows:

> I gave them the reasons why we couldn't—the company could not make a contribution to the fund this year, that the company was entering a new field, this would open up the doors to a new market for the company, it would expand their market and give us more jobs, it would lessen the slack time of the year, it would make our job more secure inasmuch as it would make the job full-year-round, and that the company had to have money to put into the machinery and equipment and molds for this, to enter this market.

After he had said this he asked the employees for their opinions and "each voiced his own opinion." The suggestion was made that the Company should put something in a booklet form and some suggested that a certain amount be set aside for the profit-sharing program. Minnier testified that since it was not in his "bailiwick to decide anything like this" he could not say yes or no but could only carry it to top management. When asked if he told the employees this, he testified that he did

not. According to Minnier "there was some violent talk" and, if he recalled correctly, "Moll said that he didn't like the company using his money to invest in new machines. . . ."

After the meeting, according to Minnier's further testimony, Moll "was working on a lathe and he was shouting 'this company is no damn good, no god damn good,' and he kept pounding on the lathe with something he had in his hand" and also said that "This company is no f---good."[5] Minnier walked over to Moll and said, "Bill, calm down. Do you think if the company didn't have your interest at heart that they'd go out and put this amount of money into machines and equipment to make your job more secure?" Moll's pithy comment to this was, "That's a lot of bull shit." According to Minnier's further testimony, several employees in the area heard the comments between him and Moll but they "almost ignored the whole incident" and didn't do anything or "take any action at all."

After the shift ended at 3:30 Minnier immediately repeated to Plant Manager Bidelspach what had occurred at the profit-sharing meeting and what had transpired after the meeting. Bidelspach's comment was, "Well, that takes a lot of guts."[6]

The following Monday, Moll showed Minnier the ad which Moll had testified about. According to Minnier, Moll

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[5] When asked how many times Moll made the last comment, Minnier testified that he could not say exactly but that he knew that Moll had said it at least once. As to how many times Moll had said the Company is "no damn good" Minnier testified that Moll had said this a couple of times that Minnier knew "of definitely."

[6] Augmenting his testimony Minnier later indicated that it was after he told Bidelspach about Moll's comment regarding his money being used by Respondent to buy machines that Bidelspach said, "Well, that takes a lot of guts."

said that "He would put it with his profit-sharing note so that he could show it to Miss Lane. . . ." Minnier told Moll, "I don't think I'd do that."

Minnier branded Moll's testimony that he very seldom spoke to Moll about his work as being untrue explaining that he was "always after every man in shop to keep the job moving." When asked if this included Mr. Moll, Minnier answered, "This includes Mr. Moll. All. When I said all, I meant all." Minnier confirmed in his testimony that Moll came to his home that evening and asked for a recommendation and that Minnier told him that he would give him a good recommendation as a machinist. He also testified that Moll had asked him at this time whether he had been discharged because of the profit-sharing plan and that his reply to Moll was that he had not. Then the following colloquy occurred:

> Q. Did he ask you again, a second time, whether he was fired because of the profit-sharing plan?
>
> A. Not to the best of my recollection. No.
>
> Q. Did he ask a question of you which you did not respond to?
>
> A. No. I think I answered every question that he asked me.
>
> Q. Did you at any time nod your head affirmatively to any question he asked without replying verbally?
>
> A. No. Not that I recall of.

According to Minnier this conversation lasted about 20 minutes to a half hour.

According to Minnier's further testimony, in February 1967, when Gibson returned to work from a heart attack that he had in December, the type of work assigned to Gibson was changed to lighter tasks. According to Min-

nier, he had spoken to Gibson about his work and his attitude towards his job many times. He "tried to get the man to do better work and to apply himself more to his job; and each time . . . he'd become violently angry." If he tried to help Gibson do the job easier or more efficiently, he would become angry and say, "I've done this for so many years, how can you tell me how to do it?" Gibson would not be open to any suggestions at all. This was true during the entire 2 years that Minnier was in charge. According to Minnier, he "tried to isolate (Gibson) but he didn't listen . . . he'd go around and bother the other guys. He was continually going around and interrupting other fellows, stirring up trouble and everything." Minnier testified about such a conversation that he had with Gibson in February 1966, which was supported by a document from Gibson's personnel file in which Minnier told Gibson to apply himself to his work so he could advance or get along better with the Company. Minnier testified that Gibson had told him that if Whittemore ever came to the first shift for any reason whatsoever Gibson would not take orders from him. Minnier told Gibson that if Whittemore was in charge Gibson would have to take orders from him.

On another occasion Gibson had told Minnier that he was going to take another job and Minnier indicated that whenever he was ready Minnier would clear him for the job. According to Minnier, at this time Gibson said he was very unhappy with his work. This matter was also reflected in a statement taken from Gibson's personnel file. Another matter about which Minnier testified regarding Gibson's work was reflected in another item from Gibson's personnel file dated November 30, 1966, regarding Gibson's refusal to take orders from Whittemore on an occa-

sion that the latter took charge of the first shift when Minnier was on vacation. According to Minnier this incident concerning Whittemore was not mentioned to Gibson on the day that he was discharged. When asked if he was sure of this from his own recollection, he testified, "I am positive from my own recollection."

Minnier also testified that he had a conversation with Supervisor Howard who told Minnier that Gibson "had asked him about (the profit-sharing statement) and was very angry about it and was very upset." Whether this was before or after Gibson's discharge does not appear in Minnier's testimony. Nor is there anything in Howard's testimony to show that his conversation with Gibson about the profit-sharing distribution was disclosed to Minnier prior to Gibson's discharge.

As to what transpired at Gibson's discharge Minnier testified as follows:

> I said, "Ed, we've been reviewing your feelings and since you aren't happy with the company we decided to leave you go. . . ." And he wondered why and I said, "Well, Ed, your performance has been below par and I bent over backwards to try to take care of you and you haven't repaid in kind." And he told me I was full of shit. And he said, "Since the big man's here let's review your record." I said, "Well, it's open. Let's look at it." And he said, "No. I'm not that kind." And he got up and started to leave and he said, "I'll get you."

On cross-examination regarding the horseplay report in Moll's personnel folder, Minnier described various "tricks" that Moll played on his fellow employees which made them angry. He also testified that Moll was not the only one engaged in such "horseplay"; that others played such

tricks too and "were very facetious about it." It further appears that Minnier had turned in unsatisfactory reports on others for such "horseplay" and named Whittemore (who later became a foreman) as one he had so cited.

It was Respondent's practice to grant one day off as a bonus for 12 consecutive weeks of perfect attendance, i.e., without being absent or tardy. On cross Minnier was asked if it was "not true that during this period of time . . . Moll was getting free days or bonus days?" [7] Minnier could not say unless he "looked at the records" and was unwilling to "venture a guess." Moreover, Minnier was unable to say whether Moll got more or less bonus days than other employees explaining that he had "never compared them" and that the question was "asking for a conclusion" on his part.

According to Minnier, Respondent's employees from time to time leave for more money but "normally" do not reveal to Respondent that they are contemplating such action. When asked if he hadn't discussed the possibility of leaving the Company and "bettering" himself Minnier answered, "Oh, I don't know. I think we all get dissatisfied at times." Asked then why he "would turn in an unsatisfactory work report on someone who made a similar comment" such as the report on Gibson, his answer was in effect because Gibson had made his comment "harsh" and "violently." [8] Ac-

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[7] According to Moll's undenied and credited testimony, at the time he was discharged he had a bonus day coming which meant that he had a perfect attendance record for a 12-week period.

[8] The report in Gibson's personnel file dated February 17, 1967, read as follows:

> E. Gibson voiced dissatisfaction with his job and was going to start employment with R. Mease for more money than he is presently receiving.
>
> I told him to tell me when he was ready to leave to let me know and we would clear him for the job.

The report was signed by Minnier, Foreman.

cording to Minnier, profanity is used throughout the machine shop and Moll's use of it was no better or worse than that of any other employee.

It appears that in mid-1966, a former employee, Butch Laurer, had been seeking reemployment. At that time Gibson, as spokesman for the employees, went to Minnier requesting a meeting with him to discuss Laurer's reemployment "because the men were afraid that he was coming back . . . at a higher rate and they would not get raises." Such a meeting was subsequently held.

Minnier also testified that not only had Gibson's many shortcomings been in evidence for as long as Minnier had been employed by Respondent but his "below par" work performance had antedated his heart attack by years according to reports Minnier claims he received about Gibson from "prior foremen." Notwithstanding that Minnier testified that he had "constantly" criticized Gibson's work he also testified that from time to time both Moll and Gibson did good work and as was his practice with all the men, Minnier, on such occasions, had complimented them. Minnier also testified that in spite of the continuous trouble that he had with Gibson, the latter always got his periodic wage increases.[9]

Credibility Resolutions

On the foregoing evidence only three resolutions seem to be called for: (1) whether Moll was as blameless and uncriticized in his job as he testified; (2) whether he did in fact make the remarks attributed to him by Minnier; and (3) whether Minnier did indeed indicate by a nod of his head that Moll's discharge was motivated by what tran-

[9] Respondent makes yearly reviews of its employees' records upon which their eligibility for wage increases are based.

spired with respect to the profit-sharing distribution. In my opinion none of the resolutions are actually necessary or essential for the disposition of the case. Nevertheless I shall dispose of them.

Thus I find, contrary to Moll's testimony, that he did receive some criticism of his conduct from Respondent. I am also inclined to believe (and I find) that Moll made some of the remarks attributed to him. But I do not believe that he kept pounding on his machine and repetitively shouted them in the manner implied by Minnier in his testimony. As for Minnier's denial of having nodded his indication to Moll that the profit-sharing protest was the reason for his discharge I do not credit it and find the contrary. In this connection I have been influenced by (among other things) the discrepancy between Minnier's otherwise dogmatic and positive testimony in general and his equivocal and uncertain testimony about his responses to Moll's implied accusation that the profit-sharing protest was the reason for his discharge.

Conclusions

It seems to me that on the foregoing evidence, even if viewed in the most favorable light for Respondent, the conclusion is inescapable that the part Moll and Gibson played in the protest and dissatisfaction with the profit-sharing distribution that was demonstrated by the employees to Minnier in the meeting he had called was the conduct which triggered and played an important part in the decision to discharge the two. Nor do I believe that the Respondent seriously contends otherwise. But, apparently, Respondent's position is that what happened and what was said by Moll and Gibson in that meeting was not concerted

activity. If such is Respondent's position it is mistaken as to what constitutes concerted activity under the Act.

Concerted activity does not necessarily require some overt manifestation of physical action on the part of employees based on some prior compact among them such as a decision to lock arms and march against an employer making claims of opposition to him. Even individual protests are protected as concerted activity "If the matter at issue is of moment to the group of employees complaining and if the matter is brought to the attention of management by a spokesman, voluntary or appointed for that purpose, so long as such person is speaking for the benefit of the interested group." *Guernsey-Muskingum Electric Cooperative, Inc.*, 124 NLRB 618, 624. There is no question that the matter of the profit-sharing distribution here was "of moment to the group" and that whatever was said to Respondent about it by any individual necessarily had to be "for the benefit of the . . . group." Moreover, suppose that here the meeting in question had taken place at the suggestion of the employees rather than of Minnier, I doubt that even Respondent would contend that what took place and was said at such meeting would not have been concerted activity within the meaning of the Act. I can see no real difference in the matter as it transpired. Indeed it would be fair to say that the meeting was held because the employees' demonstrated dissatisfaction when Minnier handed them their statements amounted to and was recognized by Minnier as an implied request for the meeting.[10] In any

[10] There is no showing in the record that Bidelspach, who had instructed the supervisors "to make sure that they got across to the employees why there wasn't a contribution made" to the profit-sharing fund on their behalf, contemplated that Minnier would convene the employees in a formal group to explain the small contribution. All that was expected of him so far as the record shows,

event, I find that the confrontation between the employees and Minnier at the meeting about the profit-sharing distribution constituted concerted activity on the part of the employees[11] protected by the Act.[12] I also find that this activity on the part of Moll and Gibson played an important and controlling part in their discharges and thus interfered with their rights under the Act in violation of Section 8(a)(1) thereof.

Where the discharge of an employee is motivated in any part whatsoever by the purpose to discourage legitimate union or concerted activity, the existence of contemporaneous, legitimate grounds for such discharge affords no defense to a finding of an unfair labor practice on the part of an employer. *N.L.R.B.* v. *Whitfield Pickle Co.*, 374 F.2d 576, 582 (C.A. 5). Having found that such was the case here there is no real necessity to comment on the past records of the two employees and Respondent's contention that those records played a part in the decision to discharge them. However, I am constrained to observe that Respon-

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was for him to explain in any manner he could the reason for the small distribution so as to placate any adverse reaction which obviously was expected by Respondent. It would appear that realizing the depth and extent of the employee dissatisfaction, Minnier apparently decided that it would require more than informal handling.

[11] The concerted nature of this activity was not limited to the meeting but was later carried on in the shop as was demonstrated by conversations between the employees about the matter, by their showing to one another the newspaper clipping referring to Respondent's profit-sharing program and not the least by their comments to each other from time to time to "have faith"—being a sarcastic reference to the remark Minnier had made in the meeting. That Respondent may not have been aware of the conduct does not excuse it, as it contends, on the grounds that it had no knowledge of it, since it obviously did have knowledge of what took place at the meeting and this was merely an extension of it.

[12] *Como Plastics, Inc.*, 143 NLRB 151.

dent's position here impresses me as one so often resorted in these cases where an employee's ordinary and average derelictions are seized upon and magnified out of all proportions in an attempt to justify an illegal discharge.

A few examples will illustrate. Respondent made much of the citation in Moll's personnel record regarding his engaging in "horseplay" which Minnier described in some detail in his testimony. But the record also shows that such "horseplay" was not confined to Moll but was practiced by other employees who also were cited for it including one who subsequently was made a foreman. In the same vein Moll's attendance record was raised by Respondent as being a factor in his undesirability as an employee; yet the undenied and credited evidence shows that for a period of about 3 months prior to his discharge Moll's attendance was perfect and he had been granted a day off in reward for it.

As for Gibson's record Respondent presumably attached some stigma to the fact that he had indicated he might take another job to better himself. While it is probably natural for an employer to feel hurt to learn that his employees do not consider that their employment is absolutely ideal, and probably too much to expect an employer to wish his employees well and betterment (although many do) when they learn such intentions, the fact is that here, according to Minnier, the citation was made not because of *what* Gibson had told Minnier in this respect but because Gibson's comment had been "harsh" and spoken "violently." Yet, strangely enough, no such mention was made in the citation.

Gibson was also claimed by Minnier to be a troublemaker yet none of the documentation received in evidence regard-

ing Gibson's record (whatever else it tended to show)[13] shows what is normally the common interpretation of the term "trouble maker," i.e., an employee who instigates and foments dissent and dissatisfaction with management on the part of other employees.[14] Only one incident is reflected in the record which might have met this description. (But Minnier denied that this is what he had reference to when he branded Gibson as a troublemaker.) This pertained to the time that Gibson had acted as spokesman for the other employees with management regarding the rehiring of a former employee which of course was protected concerted activity.

As for Gibson's claimed unsatisfactory work performance record, apart from the fact that there was nothing specific offered by Respondent to support this broad accusation, the simple fact is that even if true, which I do not believe, having lived with it for some eight years as Minnier claimed Respondent had, it is pretty clear that this was dredged up merely as an afterthought to supply a pretext for the real and illegal motive in Gibson's discharge.

There remains one other aspect of the case upon which to comment. That is whether any of the remarks which may have been made in connection with the profit-sharing distribution or against the Company either by Moll or Gibson would be grounds for not having reinstated them to their

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[13] In my disposition of this case I do not want to give the impression that I believe or find that Moll and Gibson were perfect employees devoid of any faults or shortcomings. I am sure that they had their deficiencies as do most employees.

[14] The term of course could be broadly applied to an employee who becomes troublesome solely on the basis of his own relationship with his employer but its general usage I believe pertains to the instigation of others to so act.

jobs.[15] I have heard it said that with the possible exception of the Australians, Americans use more profanity and coarse language in their day to day conversations than any other people in the world. It is common knowledge that some of the worst of this trait occurs among factory workers. Indeed, Minnier admitted that profanity was used throughout the machine shop. He further testified, incidently, (sic) that Moll was no worse than any other employees in this respect. In the last analysis it appears that whatever Moll said and did at his machine was hardly outside the norm since, according to Minnier, the surrounding employees practically ignored it. I see nothing in the comments of either Moll or Gibson that would be grounds for absolving Respondent from its liability to rectify its unfair labor practices.

III. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section II, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

IV. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I will recommend that it cease and

[15] In its brief this contention is not specifically made by Respondent—its main point being that in substance the derogatory and profane remarks were in part the cause of the discharges. That defense has been rejected as shown above.

desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discharged William E. Moll and Edwin W. Gibson for engaging in activity protected by the Act, I will recommend that Respondent be ordered to offer Moll immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of an offer of reinstatement, less net earnings during said period, with backpay computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company,* 90 NLRB 289, 291-294, including interest as held in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

I shall also recommend that Respondent similarly pay to the lawful heirs of Edwin W. Gibson the amount of money he would have earned from the date of his discharge until the date of his death together with the amount of payment that would have accrued to said heirs from Gibson's participation in Respondent's profit-sharing program had Gibson remained in Respondent's employment until he died.

I shall also recommend that Respondent preserve and make available to the Board, upon request, payroll and all other records necessary to facilitate the determinations of the amount due under this Recommended Order.

In view of the nature of the unfair labor practices committed, I am of the opinion that the commission of similar unfair labor practices may reasonably be anticipated. I shall therefore recommend that Respondent be ordered to cease and desist from infringing in any other manner upon

rights guaranteed to their employees by Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Hugh H. Wilson Corporation is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. Said unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that Hugh H. Wilson Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from discharging employees for engaging in concerted activities for the purposes of collective bargaining or other mutual aid and protection in connection with their wages, hours, or working conditions, and in any other manner interfering with, restraining, or coercing employees in the exercise of their right to engage in concerted activities for such purposes.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Reinstate William E. Moll to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole in the manner set forth in the section entitled "The Remedy."

(b) Pay to the lawful heirs of Edwin W. Gibson the amount of money he would have earned from Respondent from the date of his discharge to the date of his death in the manner set forth in the section entitled "The Remedy" together with the amount under Respondent's profit-sharing program that would have accrued to said heirs had Gibson remained in Respondent's employment until the date of his death.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll and other records relevant to a determination of the amount of backpay and profit-sharing due under the terms of this Decision.

(d) Post in conspicuous places at its plant in Sunbury, Pennsylvania, including all places where notices to employees are customarily posted, copies of the attached notice marked "Appendix." [16] Copies of said notice, on forms provided by the Regional Director for Region 4, shall, after being duly signed by Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that said

[16] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

notices are not altered, defaced, or covered by any other material.

(e) Notify said Regional Director, in writing, within 20 days from receipt of this Decision, what steps Respondent has taken to comply herewith.[17]

Dated at Washington, D. C.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their right to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, pertaining to their wages, hours, or working conditions, by discharging employees for engaging in such activities or in any other manner interfere with their rights under the Act.

WE WILL offer to William E. Moll immediate the full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him

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[17] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

whole for any loss of pay he suffered as a result of our interference with his rights under the Act.

WE WILL pay to the lawful heirs of Edwin W. Gibson the amount of money he would have earned from us from the date of his discharge to the date of his death together with the amount under our profit-sharing program that would have accrued to said heirs had Gibson remained in our employment until the date of his death.

HUGH H. WILSON CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1700 Bankers Securities Building, Walnut & Juniper Streets, Philadelphia, Pennsylvania 21202, Telephone 597-7601.